In the

Supreme Court of the United States

October Term, 1978

No. A-390

78-903

ROBERT T. EATON, doing business as Eaton Construction,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,

Respondent,

and

NATIONAL STEEL PRODUCTS COMPANY, a Texas Corporation, formerly STRAN-STEEL CORPORATION,

Real Party in Interest.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert T. Eaton, d/b/a Eaton Construction, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Ninth Circuit entered in the above entitled case on May 25, 1978 (Appendix B), and from the order from that court denying a petition for rehearing dated August 10, 1978 (Appendix A).

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for writ of mandamus is unreported and is printed in Appendix B hereto. The Order and Opinion of the United States District Court for the District of Montana, Billings Division, granting remittitur or a new trial is unreported and is printed in Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix B), was entered on May 25, 1978. A timely petition for rehearing was denied on August 10, 1978 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit should have issued a writ of mandamus directing the respondent United States District Court to set aside its Order and Opinion dated April 18, 1977 (Appendix C), ordering remittitur or granting a new trial to National Steel Products Company.

STATUTES INVOLVED

No statutes are directly involved. However, the question presented involves the Seventh Amendment to the

Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

STATEMENT OF CASE

Petitioner is a citizen and resident of the State of Montana. National Steel Products Company, the real party in interest, is a Texas corporation with its principal office in the State of Texas. Petitioner brought an action against National Steel Products Company in the United States District Court for the District of Montana, Billings Division, upon three counts: breach of contract, unlawful interference with petitioner's business and contractual relations, and for violation of federal anti-trust statutes. The basis for federal jurisdiction was diversity of citizenship and a claim based upon federal statutes.

In the course of a five week trial, the respondent district court refused to submit to the jury the issues relating to the anti-trust violation, but did submit issues of fact relating to the contract claim and the tort claim. On December 21, 1976, the six-man jury returned its verdict for petitioner on the contract claim in the sum of $26,687.54, and on the tort claim in the sum of $13,475.00, plus interest. Under the tort claim, the jury awarded petitioner punitive damages in the sum of $350,000.00. Judgment was entered December 22, 1976.

National Steel Products Company moved the court for judgment notwithstanding the verdict or in the alternative for a new trial. The district court, after receiving briefs, denied the motion for judgment N.O.V. but its Order and Opinion of April 18, 1977 (Appendix C), denied the motion of National Steel Products Company for a new trial on condition that petitioner file his consent to a remittitur of $300,000.00; or, if the petitioner did not consent to remittitur, then the motion for a new trial was granted insofar as it related to the tort claim.

Petitioner petitioned the United States Court of Appeals for the Ninth Circuit for a writ of mandamus against the respondent district court to set aside its order of April 18, 1977, and to reinstate the verdict of the jury and the judgment thereon in favor of the petitioner against National Steel Products Company. The court of appeals denied the petition on May 25, 1978, (Appendix B). Petitioner's petition for rehearing was denied by the court of appeals on August 10, 1978, (Appendix A). Petitioner now petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR GRANTING THIS WRIT

The respondent district court agreed, in its order granting remittitur or new trial, that the compensatory awards under both the contract claim and the tort claim "are fully supported by the evidence and should be allowed to stand." The district court also carefully instructed the jury on the measure to be used for punitive damages:

> "The law provides no fixed standard as to the amount of such punitive or exemplary damages, and leaves the amount to the jury's sound discretion, exercised without passion or prejudice. The jury may, however, take into consideration all of the circumstances surrounding the acts complained of in fixing the amount of such exemplary damages."
>
> (Plaintiff's (Petitioner's) Offered Instruction No. 45)

During the course of its deliberations, the jury sent out a written question to the court asking whether there were any guidelines for punitive damages. The district court, without objection by either party, responded in writing to the jury:

"It is in the exercise of your reasonable discretion."

During the course of the extremely lengthy (five week) and complex trial, petitioner presented evidence of numerous activities on the part of National Steel Products Company showing wrongful interference with petitioner's business and contractual relations. The district court, in instructing the jury, confined the jury to finding actual tort damages for loss to petitioner on two particular construction jobs. (Referred to in the district court's Order and Opinion as the "Havre and Missoula railroad jobs"). Because the district court disallowed, as incompetent, evidence offered by petitioner as to the value of petitioner's business, the court, in its Order and Opinion granting new trial or remittitur, mistakenly confined itself to considering actions of National Steel Products Company relating to the Havre and Missoula Railroad jobs. This was directly contrary to the rule in Montana that an award for

punitive damages may be sustained by a *showing* of actual damages without an actual *finding* of actual damages. As stated in *Brown v. Grenz*, 127 Mont. 49, 257 P.2d 246, 248 (1953):

> "Where as here, actual damages appear from the evidence, an award of punitive or exemplary damages will stand, though the verdict of the jury shows no finding of actual damages."

The district court did concede that the petitioner had shown that he had suffered injury:

> "While it is true that the plaintiff was unable to establish the value of his business through any competent evidence, he did prove that he suffered some injury, especially in connection with the railroad jobs, upon which the jury could award damages."
>
> (Order and Opinion, Appendix C, infra p. C-2)

The respondent district court in this case also grieviously erred in determining that the award of punitive damages was excessive when there was no evidence of the financial ability of National Steel Products Company to pay punitive damages. The purpose of punitive damages is to punish and to deter. Because National Steel Products Company introduced no evidence of financial ability to pay, as it had the right to do, the district court was without the right to determine that National Steel Products Company had been excessively punished by the award as granted by the jury. The courts have considered this matter and have uniformly decided that, absent evidence of the defendant's financial ability to pay, the court may not, on the ground of a large verdict alone, set aside or reduce an amount for

punitive damages. For example, that is the rule in Montana:

> "Here the evidence introduced in the case is not before us. We are not advised of the situation or circumstances of the parties. The financial ability of the defendant is not disclosed. An award of $1,000 exemplary damages might be excessive under certain facts as against one of improverished circumstances, and yet reasonable under different circumstances and against one of more favorable financial condition. Where the evidence is not before us, we must presume that it was sufficient to support the finding of the jury***."
>
> Johnson v. Horn, 86 Mont. 314, 283 P. 427, 429 (1929)

The Ninth Circuit Court of Appeals has agreed with this rule:

> "Appellants argue that the award of punitive damages is grossly excessive and that such an award should have some relation to ability to pay. They cite in support of their positions (citations omitted) among others. While these cases, in accordance with the general rule, indicate that the ability to pay is of some importance there is nothing in either which holds that the burden of proof is upon the injured party to produce evidence showing the misappropriators ability to pay. See (citations omitted).
>
> "The Montana statute, §17-208, R.C.M. 1947, recognizes the right to award damages '. . . for the sake of example, and by way of punishing the defendant.' The Montana courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong or situation or circumstances of the parties. (citations omitted.) *We cannot say that the punitive award was outrageously disporportionate to the situation or circumstances of the parties. Appellants offered no evidence of their finan-*

cial ability to pay. In these circumstances we will not interfere with the award." (Emphasis supplied)

Tri-ton International v. Velto, 525 F.2d 432 (9 Cir. 1975).

As stated above, the purposes of punitive damages are to punish the defendant and to set an example. To be a punishment or to be a deterent, the damages must be large enough to hurt. The burden of proof is not upon a plaintiff to prove the pecuniary ability of a defendant to pay the punitive damages assessed. Without evidence of the wealth of a defendant the court is not in a position to determine that the punitive damages are disporportionate to the circumstances of the parties. Under the rule in Montana cited above, it *must be presumed* that the evidence is sufficient to support the verdict.

The respondent district court violated the Seventh Amendment to the United States Constitution in re-examining the verdict and substituting its judgment for the jury in reducing the award of punitive damages from $350,000.00 to $50,000.00 without any evidence as to the ability of National Steel Products Company to pay such an award. The district court further violated the Seventh Amendment by requiring petitioner to *retry* his entire tort claim instead of confining the new trial to the issue of the amount of punitive damages. As stated earlier, the district court did conclude, even after the verdict was rendered, that petitioner had shown substantial and sufficient evidence to support an award of actual damages for the tort

of unlawful interference with business relations. Yet, the Order and Opinion of the district court would require the petitioner to be again put to the burden of trying a cause which originally took five weeks. The financial burden to the petitioner is unjust, and should not be allowed to stand.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Brent Cromley

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Hon. Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Hon. W.D. Murray
Senior United States District Judge
District of Montana
Federal Courthouse
Butte, Montana 59701

AFFIDAVIT OF SERVICE

DORIS J. COX, being first duly sworn, deposes and says: that she is a clerk-stenographer employed in the office of Hutton & Cromley of Billings, Montana, and as such employee, she deposited in the United States mail, in Billings, Montana, postage prepaid, in envelopes securely sealed and addressed to the persons hereinafter named, three true copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The persons served with true copies of said instruments are as follows:

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Securities Building
Billings, Montana 59101

Hon. Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Hon. W.D. Murray
Senior United States District Judge
District of Montana
Federal Courthouse
Butte, Montana 59701

/s/ DORIS J. COX

SUBSCRIBED AND SWORN to before me this 1st day of December, 1978.

/s/ GAYLENE MARTINEZ
Notary Public for the State of Montana
Residing at Billings, Montana
My commission expires
December 10, 1978

(NOTARIAL SEAL)

APPENDIX

A, B, C

FILED
AUGUST 10, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT T. EATON, d/b/a EATON CONSTRUCTION, *Petitioner*	No. 78-1400
v.	D.C. #884 Montana (Billings)
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (sic), *Respondent,*	
and	ORDER
NATIONAL STEEL PRODUCTS COMPANY, a Texas Corp., formerly STRAN-STEEL CORP., *Real Party In Interest.*	

Before: WALLACE and TANG, Circuit Judges

Upon due consideration, the petition for rehearing is denied. Neither this order nor the Court's order of May 25, 1978 shall be construed as a ruling on the merits of the District Court's order.

Mo Cal 5/15/78

FILED
MAY 25, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT T. EATON, d/b/a EATON CONSTRUCTION, *Petitioner* v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (sic), *Respondent,* and NATIONAL STEEL PRODUCTS COMPANY, a Texas Corp., formerly STRAN-STEEL CORP. *Real Party in Interest.*	No. 78-1400 D.C. #884 Montana (Billings) ORDER

Before WALLACE and TANG, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied. The Court notes that the district court did not deny that the value of petitioner's business was relevant but only held that petitioner did not offer any competent evidence of value.

Mo. Cal. 5/15/78

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT T. EATON, doing business as Eaton Construction, *Plaintiff,* vs. NATIONAL STEEL PRODUCTS COMPANY, a Texas corporation, formerly STRAN-STEEL CORPORATION, *Defendant.*	ORDER and OPINION Civil No. 884

Defendant National Steel Products Company has timely moved for judgment notwithstanding the verdict on Count II, or in the alternative for a new trial on Counts I and II of plaintiff's complaint. Rule 50(b) Fed.R.Civ.Pro. The various arguments in favor of and in opposition to the motion have been thoroughly briefed, and the matter is now ripe for decision.

Defendant's motion for judgment notwithstanding the verdict.

In support of its motion to set aside the judgment on Count II, defendant argues that the evidence failed to establish that plaintiff's business had a value of $525,000, or that a conspiracy existed between the defendant and Vroman, two allegations contained in the Pre-Trial Order.

While it is true that the plaintiff was unable to establish the value of his business through any competent evidence, he did prove that he suffered some injury, especially in connection with the railroad jobs, upon which the jury could award damages. As to defendant's contention that the evidence did not prove the existence of a conspiracy, suffice it to say that none was required. The court ruled early in the case that plaintiff could sustain his burden of proof under Count II without establishing a conspiracy between the defendant and Vroman. In conclusion, the evidence produced at the trial in connection with Count II was conflicting and could have readily lead reasonable men to different conclusions. The motion is accordingly without merit. 5A *Moore's Federal Practice* ¶50.07[2].

IT IS THEREFORE ORDERED and this does order that the motion of the defendant for judgment notwithstanding the verdict on Count II is hereby denied.

Defendant's motion for a new trial.

Of the various grounds cited by the defendant in support of its motion for a new trial, the only one which has merit and which requires a change in the result is that "[t]he verdict is excessive and appears to have been given under the influence of passion and prejudice."

At the outset it should be noted that the compensatory awards are fully supported by the evidence and should be allowed to stand. However, the court is of the firm conviction that the punitive damages awarded are excessive and that plaintiff should be given the option of remitting the

portion of the damages awarded him which is excessive or submitting to a new trial on the tort portion of the case.

Under Montana law the court must grant a new trial, or in a proper case, condition the denial of a new trial on a remittitur, where an award of punitive damages appears to have been influenced by passion, prejudice, or some improper motive, or if it is outrageously disproportionate either to the wrong done, or the situation or circumstances of the parties. *Tri-Tron Intern v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975); *Thompson v. Mattuschek*, 134 Mont. 500, 333 P.2d 1022, 1028 (1959); *Paniski v. Dreibelbis*, 113 Mont. 310, 124 P.2d 997 (1942); *Edquest v. Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933); *DeCelle v. Casey*, 48 Mont. 568, 139 P. 586 (1914).[1]

According to Section 17-208 of the Revised Codes of Montana, 1947, a jury may award punitive damages "[i]n any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed . . ." Interpretive decisions of the Montana Supreme Court of this sec-

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[1] Excessive punitive damages had compelled courts to either grant motions for new trials, or condition the denial of such motions upon the plaintiff consenting to a remittitur in the following cases: Herman v. Hess Oil Virgin Islands Corporation, 379 F.Supp. 1268, 1275 (D.Vir.Is. 1974) aff'd 524 F.2d 767 (the punitive award was oppressive in the light of the defendant's ability to pay). Bankers Life & Casualty Company v. Kirtley, 307 F.2d 418 (8th Cir. 1962); Walcher v. Loew's Incorporated, 129 F.Supp. 815 (E.D.Mo. 1949) (no precedent existed to sustain such a large award). See, Howard v. J.N. Zellner & Sons Tr. Co., 529 F.2d 245 (6th Circ. 1976); Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C.Cir. 1966); Byrne v. Frank Cunningham Stores, 89 F.Supp. 489 (D.D.C. 1950); DeCelle v. Casey, supra (no evidence of malice was present). Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401 (8th Cir. 1976); Lanfranconi v. Tidewater Oil Company, supra; Baldwin v. Warwick, 213 F.2d 485 (9th Cir. 1954); Mooney v. Henderson Portion Pack Co., 339 F.2d 64 (6th Cir. 1964); Casale v. Dooner Laboratories, Inc., 343 F.Supp. 917 (D.Md. 1972); Rosenbloom v. Metromedia, Inc., 289 F.Supp. 737 (E.D.Penn. 1968) (the award was clearly disproportionate to the wrong done).

tion also require that some actual damages be shown before an award of punitive damages will be sustained. *Brown v. Grenz*, 127 Mont. 49, 257 P.2d 246 (1953); *Fauver v. Wilkoska*, 123 Mont. 228, 211 P.2d 420 (1949). In order to determine whether the award of punitive damages is disproportionate to the wrong done, or otherwise influenced by an improper motive, it is necessary to review the record in the light of the above principles.

Without reciting the evidence in detail, there was sufficient credible evidence from which the jury could have found the following: Plaintiff is a citizen of Montana involved in the construction industry under the firm name of Eaton Construction. Defendant is a manufacturer of steel buildings headquartered in Houston, Texas, engaged in marketing its products through written franchise agreements entered into with dealers throughout the United States, including Montana. In April of 1964 the plaintiff became the distributor of defendant's products for the city and surrounding area of Billings, Montana. This initial agreement was later superseded by an agreement dated September 12, 1967, in which the parties agreed that the plaintiff should have the "non-exclusive right to sell, erect, and service Stran-Steel Products," and further stated that the franchise was terminable with or without cause upon sixty days notice of either party. With his franchise plaintiff completed the sale of steel buildings with other dealers in the Billings area.

From mid-1965 to the latter part of 1969, the plaintiff

encountered problems with shipments of steel from the defendant's factory, i.e. upon the arrival of a shipment of steel it was discovered that some pieces were defectively manufactured and others were missing. Plaintiff orally demanded that defendant pay him for expenses incurred in correcting the mistakes and the defendant agreed. But plaintiff was never fully satisfied, and these claims became a part of Count I of his complaint, his breach of contract claim.

In 1966 John Vroman, then District Manager for the defendant, contacted plaintiff and expressed a desire to buy into the plaintiff's business. Plaintiff was agreeable and hired Vroman on a salaried basis until such time as he could raise sufficient capital to buy into the business, but Vroman never succeeded in raising the money. He did, however, become a key man in plaintiff's organization, especially in the area of sales. In March of 1969 Vroman quit Eaton Construction and returned to the defendant as a District Manager because he was not being paid. Later that year Vroman solicited former employees of the plaintiff to join him in the construction business, and ultimately succeeded in obtaining a franchise from the defendant in November of 1969, after the plaintiff's franchise had been terminated.

During the course of Vroman's employment with the plaintiff, specifically in late 1967 through 1968, serious problems developed between the parties over projects at Missoula and Havre, Montana. In connection with the

Missoula job, plaintiff had received an invitation to bid a structure from a railroad. The bid offer, which was to include both the erection and sale of steel portions of the contract, was sent to the defendant with directions to include a quote for the steel and then to forward the entire quote to the railroad. Instead of forwarding the plaintiff's bid as requested, defendant secured the bid for the sale of the structure for itself and left the erection portion to the plaintiff. In connection with the Havre job, plaintiff bid and the contractor (Fuglevand) accepted both the supply of steel and erection portions of the contract. Thereafter, the defendant intervened and forced the contractor to purchase the building from it rather than from the plaintiff, which again left the plaintiff with only the erection portion of the project. Defendant shipped the steel for the building on the project, but so many of the parts were defectively manufactured or improperly matched that completion of the project was retarded several months at considerable additional expense to the plaintiff.

The case was submitted to the jury on two counts.[2] Under a breach of contract claim plaintiff asked for compensatory damages incurred in correcting the defective shipments of steel sent by the defendant on various jobs, including the Havre job. Under a tort claim plaintiff asked *inter alia* for compensatory and punitive damages for defendant's tortious interference with his contracts on the

[2] The court directed a verdict for the defendant on plaintiff's third claim (conspiracy to violate the anti-trust laws) at the conclusion of plaintiff's case in chief.

Havre and Missoula jobs, and for hiring Vroman away from plaintiff. In addition, plaintiff alleged under both counts that he had been driven out of business and asked that he be awarded damages for the value of his business, stated to be $525,000. Plaintiff failed, however, to produce any competent evidence of the value of his business, and the court instructed the jury to disregard the loss of business in its consideration of damages in the case.

After a lengthy trial, the court instructed the jury, *inter alia*, that if they found that the defendant had interfered with plaintiff's employer-employee relationship with John Vroman and had, in rehiring Vroman, acted maliciously toward the plaintiff, that it could award plaintiff damages. The court further charged the jury that if it found that the defendant had maliciously interfered with plaintiff's prospective or contractual business relationships with third parties on the Havre and Missoula railroad jobs, that they could award damages caused thereby. In addition, the court instructed the jury that it could award punitive damages in connection with plaintiff's second claim if they found defendant's conduct was motivated by malice which was defined as a "motive and willingness to vex, harass, annoy or injure another person." The jury returned a verdict of $26,687.54 on plaintiff's contract claim, $13,475.00 on the tort claim, $18,073.13 interest on the first two claims, and $350,000.00 punitive damages under the second claim.

The defendant's challenge to the verdict as it relates to

punitive damages requires that the court determine whether there was any evidence of malice or oppressive conduct upon which such an award could be based. *See, DeCelle v. Casey, supra.* The evidence disclosed that the defendant intentionally interfered with plaintiff's business relationships with contractors on the two railroad jobs. Defendant offered by way of justification for such acts evidence from which the jury could conclude that it was customary in the steel products trade for manufacturers to sell directly to the railroads, thus obviating the markup on the dealer and securing the best possible competitive advantage. In addition, defendant relied on the franchise provision which provided that the defendant could sell directly to the customers in plaintiff's area if certain conditions (none of which appeared at the trial) were satisfied. The defendant also argued that the plaintiff had consented to the direct sales and had accepted payments of $1,000.00 on the Havre job in lieu of the markup on the steel. While the evidence was conflicting, there was substantial evidence upon which the jury could have believed plaintiff's version that he did not consent to such an arrangement.

Granted, the defendant had a legitimate interest in obtaining sales of its steel to the railroads, but by deliberately selling directly to such customers in violation of plaintiff's prospective or contractual business relationships defendant exceeded the bounds of propriety. Such acts therefore evince some malice for which the jury was justified in awarding some punitive damages. *See, Lan-*

franconi v. Tidewater Oil Company, 376 F.2d 91 (2d Cir.1967) cert. den. 389 U.S. 951.

Plaintiff maintains that the punitive damages can also be supported on other alleged wrongful conduct of the defendant: i.e. hiring away of Vroman, credit problems, other direct sales, and late produced documents. None of these grounds, however, can sustain a punitive award.

Vroman was not hired away from plaintiff by the defendant, he simply quit because he was not being paid. Vroman's activities in asking some of the plaintiff's employees to join him in a business venture and in soliciting plaintiff's customers to buy from him (to no avail) were neither malicious nor damaged the plaintiff. Plaintiff's contention that the defendant and Vroman were engaged in a grandiose scheme aimed at squeezing him out of business is not supported by the evidence, and seems ludicrous in the light of the franchise provision which permitted either party to terminate the agreement for any reason.

Defendant terminated further sales of steel to the plaintiff on credit and placed him on C.O.D., or sold the steel directly to plaintiff's customers, to ensure payment for the steel shipments. Plaintiff's credit problems stemmed from the fact that the parties were at loggerheads over the settlement of plaintiff's claims against the defendant for correcting defective shipments of steel. These claims, however, arose out of contract obligations for which punitive damages could not be awarded. R.C.M. 1947,

§17-208. In addition, the direct sales by the defendant to plaintiff's customers were made pursuant to the franchise agreement and claims flowing therefrom likewise could not support punitive damages. Lastly, plaintiff's contention that defendant's conduct during pre-trial discovery could provide a basis for a punitive award is without merit. Accordingly, the only substantial basis upon which the jury could have awarded punitive damages is found in the defendant's interference with plaintiff's business relationships in connection with the Havre and Missoula railroad jobs. Is the award of $350,000 then, outrageously disproportionate to the wrong done, or so large as to manifest an improper motive on the part of the jury?

The court is firmly convinced from its review of the evidence that the award of punitive damages in this case is grossly excessive and outrageously disproportionate to the wrong done.

> When an award of exemplary damages is wholly out of proportion to the wrong done and its cause and it is so large that it cannot be accounted for on any other theory, the conclusion is inescapable that the award was measured by passion and prejudice of the jury. *Franck v. Hudson*, 140 Mont. 180, 373 P. 2d 951, 954 (1962).

Although there was sufficient evidence to support an award of some punitive damages, the degree of maliciousness or oppressiveness was not so great as to justify an award of $350,000. The jury may have been motivated by plaintiff's argument that he should be compensated for his loss of business, a matter which the court admonished the

jury not to consider; or the jury may have been impressed by the fact that the defendant's parent company was the third largest steel producer in the United States, a factor which was irrelevant. *Herman v. Hess Oil Virgin Islands Corp., supra.* If allowed to stand, this award would result in a miscarriage of justice.

In order to cure this fault the court must either grant a new trial, or condition the denial of a new trial on a remittitur.[3] *Casale v. Dooner Laboratories, Inc., supra; see also, Miller v. Boeing Company*, 245 F.Supp. 178 (D.Mont. 1965); *DeCelle v. Casey, supra.* Having in mind the jury's desire to punish the defendant and being mindful that the court ought not substitute its judgment for that of the jury, I have concluded that defendant's motion for a new trial should be denied on the condition that plaintiff file his consent to a remittitur of $300,000. If the plaintiff does not consent to the remittitur then defendant's motion for a new trial is granted insofar as it relates to the tort claim.

The court submitted the case to the jury on two claims: one for breach of contract, and the other for tortious interference. The verdict form reflects that the jury decided the case on that basis. The Pre-Trial Order, however, contains allegations of breach of contract and tort in Count I, and allegations of tort in Count II. Rather than rule on defendant's motion as it relates to a particular count, the court believes that in order to secure a more just result its order

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[3] Use of a remittitur to cure an excessive punitive verdict has been impliedly recognized by both the Ninth Circuit and the Montana Supreme Court. See, Baldwin v. Warwick, supra; Edquest v. Dragstedt Co., supra.

should apply only to the tort claim, and not the contract claim.[4] Insofar as the motion relates to the plaintiff's contract claim, it will be denied.

For the foregoing reasons,

IT IS ORDERED and this does order that the motion of the defendant for a new trial, insofar as it relates to plaintiff's contract claims is hereby denied.

IT IS FURTHER ORDERED that the motion of the defendant for a new trial, insofar as it relates to plaintiff's tort claims, is granted, unless the plaintiff shall file his consent in writing with the Clerk of Court to a reduction in the amount of the judgment of $300,000, within 15 days from this date, in which event the motion for a new trial on the tort claims is denied.

As a matter of housekeeping the court noticed that judgment has not been entered on the directed verdict in favor of the defendant on plaintiff's third claim (conspiracy to violate the anti-trust laws).

IT IS THEREFORE ORDERED and this does order that the Clerk of the Court shall upon receiving this OPINION AND ORDER enter judgment on said directed verdict.

Done and dated this 18th day of April, 1977.

W.D. Murray
Senior United States District
Judge.

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[4] Rule 59(a) permits a court to grant a new trial as " to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury " Rule 59 Fed.R.Civ.Pro. 6A Moore's Federal Practice ¶59.06.

78-903

No. A-390

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT T. EATON, doing business
as Eaton Construction,
Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
Respondent

and

NATIONAL STEEL PRODUCTS COMPANY,
a Texas Corporation, formerly
STRAN-STEEL CORPORATION,
Real Party in Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL STEEL PRODUCTS COMPANY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. A-390

ROBERT T. EATON, doing business
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v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
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NATIONAL STEEL PRODUCTS COMPANY,
a Texas Corporation, formerly
STRAN-STEEL CORPORATION,
Real Party in Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL STEEL PRODUCTS COMPANY IN OPPOSITION

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for writ of mandamus is unreported but is printed as Petitioner's Appendix B. The opinion of the District Court is unreported but is printed as Petitioner's Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1978. A petition for rehearing was denied on August 10, 1978 (Pet. App. A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in denying the petition for writ of mandamus?

STATEMENT

In the District Court, petitioner sought to recover from National Steel Products Company on three separate causes of action. Count One was based upon breach of contract, Count Two was based upon tort and Count Three concerned alleged violations of the anti-trust laws. At the conclusion of petitioner's case, the District Court granted the motion of National Steel Products Company for directed verdict on Count Three, the anti-trust claim, and submitted the case to the jury on the claims for damages resulting from breach of contract and tort.

On December 21, 1976, the jury returned verdicts in favor of the petitioner upon the breach of contract and tort claims and assessed punitive damages on the tort claim. National Steel Products Company made a motion for a new trial upon the tort claim, and the District Court denied the motion upon the condition that the petitioner consent to a remittitur. The petitioner refused remittitur and the District Court granted a new trial upon the tort claim.

Petitioner then petitioned the United States Court of

Appeals for the Ninth Circuit for a writ of mandamus directing the District Court to reinstate the jury verdict. The Court of Appeals denied the petition on May 25, 1978 and denied the petition for rehearing on August 10, 1978.

ARGUMENT

1. Petitioner's contention (Pet. 5-6) that the District Court, in its order and opinion granting new trial or remittitur, mistakenly confined itself to considering actions of National Steel Products Company relating to the Havre and Missoula railroad jobs is incorrect.

After a detailed discussion of the evidence produced in support of Petitioner's claim for punitive damages (Pet. App. C-4 — C-10) the District Court concluded as follows:

> "Accordingly, the only substantial basis upon which the jury could have awarded punitive damages is found in the defendant's interference with plaintiff's business relationships in connection with the Havre and Missoula railroad jobs. Is the award of $350,000 then, outrageously disproportionate to the wrong done, or so large as to manifest an improper motive on the part of the jury?
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> "The court is firmly convinced from its review of the evidence that the award of punitive damages in this case is grossly excessive and outrageously disproportionate to the wrong done.
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> 'When an award of exemplary damages is wholly out of proportion to the wrong done and its cause and it is so large that it cannot be accounted for on any other theory, the conclusion is inescapable that the award was measured by passion and prejudice of the jury. *Franck v. Hudson*, 140 Mont. 180, 373 P.2d 951, 954 (1962).'

"Although there was sufficient evidence to support an award of some punitive damages, the degree of maliciousness or oppressiveness was not so great as to justify an award of $350,000. The jury may have been motivated by plaintiff's argument that he should be compensated for his loss of business, a matter which the court admonished the jury not to consider; or the jury may have been impressed by the fact that the defendant's parent company was the third largest steel producer in the United States, a factor which was irrelevant. *Herman v. Hess Oil Virgin Islands Corp., supra.* If allowed to stand, this award would result in a miscarriage of justice." (Pet. App. C-10 — C-11)

Therefore, the District Court did not mistakenly confine itself to considering actions of National Steel Products Company relating to the Havre and Missoula railroad jobs and ignore Petitioner's evidence of "numerous activities on the part of National Steel Products Company showing wrongful interference with Petitioner's business and contractual relations". (Pet. 5) Instead, the District Court concluded that all evidence, except that relating to the Havre and Missoula railroad jobs, was either incompetent or insufficient to support the punitive damage award.

2. Petitioner's argument (Pet. 6) that the District Court erred in determining that the award of punitive damages was excessive when there was no evidence of the financial ability of National Steel Products Company to pay punitive damages misinterprets the conclusions of the District Court.

Petitioner cites language from a 1975 decision of the Ninth Circuit Court of Appeals[1] interpreting Montana law on punitive damages as follows (Pet. 7):

[1]*Tri-ton International v. Velco*, 525 F.2d 432

"The Montana statute §17-208, R.C.M. 1947, recognizes the right to award damages '. . . for the sake of example and by way of punishing the defendant'. The Montana courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong or situation or circumstances of the parties."

Petitioner then argues that the punitive damages cannot be considered excessive when there is no evidence of the financial ability of National Steel Products Company to pay. As clearly stated in the Ninth Circuit decision above, the circumstances of the parties (ability to pay) is only one of the grounds which may invalidate a punitive damage award. Such an award is also injust if it is outrageously disproportionate to the *wrong* committed and if so, the financial position of the defendant is irrelevant. The District Court arrived at the specific conclusion that the award of punitive damages was grossly excessive and outrageously disproportionate to the wrong done (Pet. App. C-10) and no evidence of the financial ability of National Steel Products Company to pay punitive damages was necessary.

3. Petitioner's contention (Pet. 8) that the District Court violated the Seventh Amendment in re-examining the verdict and substituting its judgment for the jury in reducing the award of punitive damages is unsupportable.

While a district court may not arbitrarily reduce the amount of damages awarded, where damages clearly appear excessive the court may condition a denial of a motion for new trial upon the filing by the plaintiff of a

remittitur in a stated amount. In this way, the plaintiff is given the option of either submitting to a new trial or of accepting the amount of damages the court considered justified. Such a practice has been clearly sanctioned by long usage and accepted uncritically by this Court.

> "If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Linn v. United Plant Guard Workers*, (1966) 86 S.Ct. 657, 644, 383 U.S. 53, 65-66, 15 L.Ed.2d 582, 591.

4. By his petition for writ of mandamus, the petitioner is attempting to circumvent the "finality rule" and obtain review of an interlocutory order. While the courts clearly have broad mandamus power pursuant to the authority of 28 U.S.C. §1651[2], the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations[3].

In a 1976 decision of this Court, *Kerr v. United States District Court*, 426 U.S. 394, 48L.Ed.2d 725, 96 S.Ct. 2119, the petitioner had also petitioned the Court of Appeals for the Ninth Circuit to vacate an interlocutory order of a district court, which petition was denied. On certiorari, the United States Supreme Court affirmed the order of the Court of Appeals and in doing so stated as follows:

> "As we have observed, the writ 'has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to its duty to do so."' *Will v. United States, supra*, at 95, 19 L Ed 2d 305, 88 S Ct 269, quoting *Roche v Evaporated Milk Assn.* 319 US 21, 26, 87 L Ed 1185, 63 S Ct 938 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' *Will v United States, supra*, at 95, 19 L Ed 2d 305, 88 S Ct 269, the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' *Ibid.*
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> "Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case 'have the unfortunate consequences of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him' in the underlying case." 426 U.S. 402

Having determined that the punitive damage award was grossly excessive and outrageously disproportionate to the wrong done, the District Court was under a duty to require a remittitur or a new trial. Proper observance of this duty cannot be challenged as a judicial "usurpation of power" and the Court of Appeals was correct in denying the petition for writ of mandamus.

CONCLUSION

This petition for writ of certiorari does not involve a federal question of substance nor has the Court of Appeals decided any important state or territorial question in conflict with applicable state of territorial law. The order of the Court of Appeals followed applicable decisions of this

[2] *La Buy v Howes Leather Co.*, (1957) 352 U.S. 249; *Schlagenhauf v. Holder*, (1964) 379 U.S. 104.

[3] *Will v. United States*, (1967) 389 U.S. 90, 95, 19 L.Ed2d 305, 88 Sup. Ct. 269.

Court and fully conformed to the accepted and usual course of judicial proceedings. Therefore, petitioner has presented no justification calling for an exercise of this Court's power of supervision and the petition for writ of certiorari should be denied.

Respectfully submitted,

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